No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

O. S. HARPER, *Petitioner*,

v.

THE STATE OF TEXAS, *Respondent*

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1.

The Opinion of the Court Below

The opinion of the Court of Civil Appeals is reported in STATE v. HARPER, 188 S.W. (2d) 400 (R. 152). Motion for rehearing was overruled (R. 158). Petitioner applied to Supreme Court of Texas for writ of error (R. 161). Application denied (R. 176). Petitioner filed motion for rehearing (R. 171). Overruled without opinion (R. 176). Jurisdiction.

1. Judicial Code, Section 237, as amended, Subdivision B,

providing: It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause * * * where any * * * right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any * * * statute * * * of the United States. Sec. 344, Title 28, U. S. C. A.

2. The date of the judgment of the Supreme Court of Texas refusing application for writ of error to Court of Civil Appeals was October 3, 1945; the date of overruling motion for rehearing was October 31, 1945. Date upon which to file petition for certiorari in this matter has been extended to March 1, 1946.

3. The nature of the case and of the rulings below were such as to bring the case within the jurisdictional provisions relied upon, to-wit:

Petitioner, having imported cattle from the tick infested area of Mexico, and having placed same in bonded warehouses, under bonds wherein such warehouses were specifically designated, claimed immunity from state ad valorem taxation under Art. 940(d), Customs Regulations of 1937, providing:

> "Imported goods in bonded warehouse are exempt from taxation under the general laws of the several states."

Arts. 1555-6-7, Title 19, U. S. C. A. providing that the Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses; that merchandise may not remain therein in excess of three years (that buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise).

Art. 1, Sec. 10, CONSTITUTION OF THE UNITED STATES, provides that: "No state shall, without the consent of Congress, lay any imposts or duties on imports * * * except what may be absolutely necessary for executing its inspection laws."

Each of the foregoing statutes and constitutional provisions was relied upon by petitioner in the trial court in his pleading, in the Court of Civil Appeals in his appeal and motion for rehearing, in his application for writ of error and motion for rehearing in the Supreme Court.

Upon October 25, 1944, the trial judge filed his conclusions of law (R. 13) to the effect:

That property while in the custody of customs officials in the course of importation from a foreign country * * * not having been commingled with the general mass of property in the state is not subject to taxation by the State; rules of the Secretary of the Treasury under which pastures may be designated as bonded warehouse enclosures and cattle held in bond within such enclosures for a period not exceeding three years is valid; that there was no commingling.

The Court of Civil Appeals in its decision, departed from the rules laid down for bonded warehouses under which the Secretary of the Treasury had recognized the pasture in question, and held:

"If it can be said that cattle running on the range in Dimmit County in two bonded pastures, one containing more than 15,000 acres and the other more than 3,000 acres, are merchandise stored in a bonded warehouse in the original package, then, unquestionably, they are not subject to the tax. The fact that the cattle were running on the range, sustaining themselves from the substance of the land in the same manner as other cattle in the county, and had thus become incorporated with the general mass of property in the State, was the determining factor." To subserve brevity no further statement is here made.

Specifications of Error

1. The Court of Civil Appeals erred in holding that imported cattle, confined in bonded pastures, designated and approved by the Secretary of the Treasury, were subject to taxation by the State.

2. The Court of Civil Appeals erred in holding that imported cattle, restrained in properly bonded pastures, not commingled with the other property of the State, were subject to State taxation.

3. The Court of Civil Appeals erred in holding that imported cattle could not be recipients of the benefits of bonded warehouses.

4. The Court of Civil Appeals erred in limiting the benefits of bonded pastures so as to preclude the benefits by importers of cattle because same ate the vegetation within such pastures.

5. The Court of Civil Appeals erred in holding cattle involved were running on the range the trial court having found as a fact they were inclosed.

The parties to this suit have agreed each with the other by stipulation:

(a) The taxpayer, O. S. Harper, admits that the statutory procedure with respect to the levying and assessing of the taxes in issue, was followed in this case, and, if the State of Texas possesses jurisdiction to impose the taxes in issue, said O. S. Harper, admits that he is liable in the amount determined by the courts of Texas.

(b) The jurisdiction of the State of Texas to impose the taxes in issue is in no way determined by the fact that petitioner might have made a voluntary rendition of the cattle in question or by the fact that the taxpayer failed to appear

before the appropriate board of equalization to contest the tax, and that the decision herein was in no way predicated upon any theory that the aforementioned facts confer jurisdiction upon the State of Texas to impose the taxes in issue.

(c) The taxpayer, O. S. Harper, defended upon the theory that such cattle were "imports" within the meaning of Sec. 10, Art. 1, CONSTITUTION OF THE UNITED STATES, located in a bonded pasture or warehouse, under Section 1555, Title 19, U. S. C. A., together with the regulations promulgated thereunder, and hence that neither the State of Texas nor any other taxing agency possessed jurisdiction to impose a tax upon said cattle.

Argument

Due to the fact that the various propositions advanced are so nearly similar and that the same facts are pertinent to all, the argument will be under all the specifications of error.

The decision of the Court of Civil Appeals is in conflict with Article 1555, Title 19, U. S. C. A., with Art. 1, Sec. 10, CONSTITUTION OF THE UNITED STATES, prohibiting tax on imports; with Art. 940(d) CUSTOMS REGULATIONS OF 1937, declaring imported goods in bonded warehouses exempt from taxation; with TREASURY DECISION No. 50974, providing for warehousing of imported cattle in pastures.

While the Court of Civil Appeals indicates that it follows two recent cases, TRES RITOS RANCH CO. v. ABBOTT, 105 Pac. (2d) 1070 and IN RE MILLER LAND & LIVESTOCK CO., 56 Fed. Sup. 34, yet the facts in those cases are too dissimilar to those in this for them to serve as authorities or criterions. In those cases, the cattle were actually upon the open range, in this they were confined in fenced pastures under customs supervision and regulation, inspected and found reasonably secure by customs authorities before being designated as appropriate bonded warehouses.

Tomas H. Gonzalez, testified:

These cattle were always in the custody of the United States Customs. We counted and weighed them at Eagle Pass and shipped them to the warehouse pastures at Catarina (about 70 miles). The trucks were bonded. I made the application (for bond) myself to Washington and handled the whole matter through the customs house in Laredo and the Bureau at Washington. Mr. Harper signed the bonds (R. 26). At Catarina 85 head, marked "for consumption" had died in bonded pastures. Harper had to pay the duty on them (R. 27). I went through the formalities with the government which were necessary to bond a pasture (R. 28). There is no limit on how many acres that bonded warehouses can contain. It could contain a million but you have to specify that in your application (R. 31). An importer has three years time to pay duty on imports. Many cattle are imported from Mexico in what is known as bonded warehouses (R. 32). To meet the minimum requirements to become a bonded pasture it must be properly fenced, sufficient supply of water and enough grass for cattle to live on * * * at the time application is made, contract from owner of land, three maps indicating the location of the gates and water supply (R. 37). After application is made the United States Customs sends an inspector to verify the fences and water supply. The pasture must be cleared of all other cattle before bonded cattle are placed in there (R. 38). Notwithstanding the Government has that bond, it has what you call constructive control over those cattle in addition to the bond until the duties are paid. The Treasury Department really designates the bonded pastures after investigation (R. 39). The man putting in the cattle has not only to give a bond to the government in the amount required that the duties will be paid, he has to furnish a pasture and have it designated as a bonded warehouse (R. 40).

Dillon testified:

The cattle were shipped, first train April 14, 1942, second train, April 19, 1942. All the cattle that went into those pastures were shipped out by train (R. 41). The cattle had taken on no weight. We had to resort to burning pear, every day to feed them, for lack of grass. Mr. Coker was there all the time. He slept at our camp, he rode the fences, examined the cattle, put locks on the gates (R. 43). I would judge that probably around 60 to 70 head died of malnutrition. I am familiar with the fences around these pastures. They are four and five barbed wire, with lumber gates and steel hinges. At the time the Harper cattle were shipped no cattle remained. Only Harper cattle were in those pastures. The gates were locked. Mr. Cok[illegible] put on a large sign, 2-½ feet long and (R. 45) probably [illegible] foot or 18 inches wide, with "U. S. BONDED WAREHOUSE—OFFICER IN CHARGE." The pasture was fenced solid with two outside gates (R. 46). Harper had in the neighborhood of 2000 head in my pasture (R. 48). The lease to Harper was from November, 1941, to May 1, 1942—a period of four months (R. 49).

We took about 2-½ to 3 weeks time working to get them all, because we were instructed to do so by the Government authorities (R. 54). No, there were no live cattle in the pasture after we shipped them (R. 55). We kept fence riders on the fence. They rode every day. Cattle could not have gotten out of that pasture without leaving a track. There was no evidence of other cattle having broken in (R. 56). Carcasses were reported to Coker. The fence riders would mark the spot and then point it out to Mr. Coker, who rode the pasture before they went in and afterwards. He was there many times looking for dead carcasses, checking the fence and locked gates (R. 58). The purpose of the fence rider is to repair fences down and broken every day (R. 60).

O. S. Harper testified:

The 85 head (reported withdrawn for consumption) were cattle that died in Dimmit County, were never inspected nor reported dead within 30 days and upon which I had to pay duty. 24 head more died in bonded pastures. There were none other than my cattle in the pastures when I introduced (mine) (R.68). Coker rode the fences periodically, he was in charge of them, designated by the Custom House (R. 70). Some of (my) cattle were put into the McDonald pasture, with locks and gates. Coker counted them in and out. The cattle were trucked in bonded trucks 70 odd miles from Eagle Pass to (Dimmit pastures). Customs Department won't allow them to travel in anything except bonded trucks (R. 71). I do not think it possible that any cattle might have escaped from the pastures. You ride these fences every day and a cow cannot go through the fence without leaving a trace, and if they get through the man will find them if it takes a day or a week. If they had been stolen and taken to market, they would have been picked up. They were branded with my brand (R. 79). Coker inspected the pastures, spent several days there and cattle make tracks, they have to come to water. We did not pay Coker, we paid the Custom House (R. 80).

J. D. McDonald testified, called by the State:

My pasture was what is commonly known as a U. S. Government Warehouse. Harper had it bonded. 200 of his cattle were placed there, the pasture then was clean (free of other cattle). One cow showed up there. I reckon she must have broken in. The Government inspector found her. She belonged to the owner of the adjoining pasture. There was a new four-wire fence between our pastures (R. 95). Either this cow was in there when they moved the cattle in or she

broke in later. She was removed upon discovery. One night some of the cattle stampeded and broke out on the highway; I got them back immediately (R. 96). Three cattle were missing when we took them out. They could have died and not been found. They could not have broken out into any joining pasture (R. 97).

Although the Court of Civil Appeals referred to the Harper cattle as running on the range the evidence does not sustain that conclusion. There may have been confusion with the cattle in TRES RITOS RANCH CO. v. ABBOTT, 105 P. (2d) 1070 or in IN RE MILLER LAND & LIVESTOCK COMPANY, 56 Fed. Sup. 34.

Unlike the facts in the HARPER case, the Tres Ritos Ranch was "open range," that is not fenced in, so that cattle from other ranches could, and during 1936 and 1937, did, mingle at will with those belonging to petitioner. Bulls were imported from Texas and Colorado and commingled with the cattle imported from Mexico. The trial court there found that the cattle had become incorporated with the mass of property in the state and county wherein they were kept, and that the petitioner had not complied sufficiently with the terms of Section 1555, Title 19, U. S. C. A., to designate that ranch a bonded warehouse, that cattle not owned by the petitioner were allowed to graze on the ranch * * * it appears incontrovertible that the imported cattle became commingled with the other property of the state, just as much as a sack of imported grain when mixed with a sack of home grown grain loses its characteristics as an import and becomes subject to state taxation.

The MILLER case, also, is too different in facts to support the opinion of the Court of Civil Appeals. There the tax debtor presented merely a letter under seal by the Collector of Customs showing that 15,565 cattle were stored in a

Class 4 bonded warehouse under authority of Article 940(d). They were not warehouses lacking security. Some of the cattle were seen 8 or 10 miles from the warehouse. Part of the enclosure consisted of a canyon wall which could not prevent the cattle from grazing over other lands and commingling with other livestock. There were no locked doors nor gates leading to the warehouse. Cows and calves of debtor were seen upon the property of others. The ranch contained 160,000 acres. It was lacking in security and consequently was not legally established and maintained.

The Harper cattle were not upon "open range." "Range" as used by ranchmen signifies sparsely populated and unin-closed prairie, over which stock growers have been allowed to let cattle * * * roam and feed without restraint. MILLER v. LEWIS, 97 N.W. 364.

Upon the question as to whether animated merchandise that ate was properly accorded the right to bonded warehouses we think that the language amending Section 19.1(a), CUSTOMS REGULATIONS OF 1943, TREASURY DECISION 50,-974, clears up that question completely.

> "Class 4—Bonded yards or sheds for the storage of heavy and bulky imported merchandise; stables, pens or corrals, or limited enclosures for the storage of imported animals * * * . As a result of this amendment the establishing of pastures as customs warehouses of Class 4 for the storage of imported cattle or other animals shall not be permitted * * * This amendment, however, shall not preclude the entry of cattle or other animals for warehousing in suitable stables, feeding pens, corrals, or other similar buildings or limited enclosures which have been or may hereafter be approved by the Bureau of Customs as customs warehouses of Class 4. Cattle or other animals entered for warehouse before the effective date of this amendment may remain in the bonded pastures for the statutory period, and each

bonded pasture shall be discontinued by the Bureau of Customs promptly upon the withdrawal of all of the cattle or other animals warehoused therein. Collectors of Customs shall notify the Bureau promptly as each bonded pasture becomes free of imported merchandise. Filed with the FEDERAL REGISTER, Dec. 1, 1943. FEDERAL REGISTER SERVICE No. 2118.

The Harper cattle occupied the bonded pastures before the amendment and were entitled to remain the full three years.

Petitioner urges that where the trial court found as a fact that the pastures were found reasonably secure, after inspection, for confining cattle, the State is bound thereby, that being a question of fact.

Conclusion

Petitioner feels that the foregoing recitation of the testimony has taken the place of more formal argument.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that petitioner may not be deprived of his rights under the Constitution, the Federal Statutes and the Treasury Regulations cited herein, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Court of Civil Appeals and finally reverse it.

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